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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1391

HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Petitioner,

versus

BENITO LOPEZ, EGAN OLDENDORF and
INTERNATIONAL TERMINAL OPERATING CO., INC.,

Respondents.

BRIEF OF RESPONDENT, INTERNATIONAL TERMINAL OPERATING CO., INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

As set forth in the as yet unreported opinion of the Court of Appeals:

> "On October 21, 1968, International Terminal Operating Co., Inc. (ITO), a stevedoring company, and Hoffman Rigging and Crane Service, Inc. (Hoffman), the owner and operator of a shoreside crane hired by ITO, were engaged in unloading a cargo of steel beams from the M/V Jobst Oldendorf, a vessel owned by Egan Oldendorf. The vessel was tied up with her portside inshore and her starboard side offshore. Prior to the arrival of the longshoremen, the ship's per-

sonnel removed the lashings and chocks which had secured the stow. The Hoffman crane, operated by Leo Hogan, was driven onto the pier alongside the hatch of the vessel and received instructions from an ITO signalman.

The accident which occasioned this litigation occurred with the removal of the first draft.

The plaintiff Benito Lopez and three other longshoremen secured the first draft with chains and attached them to the cargo hook of the crane. The ITO signalman then instructed Hogan merely to hoist the hook with the cargo attached. Instead, Hogan raised the boom of the crane, causing the draft to drag from the offshore side over to the inshore side. The draft struck and disloged a beam which fell over and onto Lopez's leg."

The Hoffman crane came with two employees of Hoffman, an operator named Hogan and an oiler named Spillane. They testified on trial that they had been hired by Hoffman, were paid their salaries by Hoffman, and had appropriate tax and other deductions withheld from their salaries by Hoffman. They were told by Hoffman where to go to work and what to do. When their services were no longer required, they were released from employment by Hoffman.

They both further testified that they were Hoffman employees and that when they arrived at the pier in the crane on October 21, 1968, they boarded the vessel to determine for themselves how the crane and its boom should be positioned.

The Trial Judge found that the raising of the crane boom by Hogan, without any signal to do so, "caused the

sliding motion inshore of the draft which hit one of the I-beams, which in turn fell on the plaintiff and caused the accident."

Hoffman was held liable to the plaintiff because its employee Hogan operated the crane contrary to the signals being given to him by the ITO signalman. Those findings were affirmed by the Court of Appeals as the above quotation from its opinion indicates.

Hoffman seeks to avoid its liability to the injured longshoreman for the negligence of its employee Hogan by urging that since he was supposed to follow the signals of the signalman he could not be considered as its employee.

POINT I

Hoffman's petition for a Writ of Certiorari appears to be untimely.

The judgment of the Court of Appeals which Hoffman seeks to have reviewed was entered on December 9, 1976. Hoffman never sought rehearing and never moved to amend or modify such judgment. Nor did Hoffman ever move for an extension of time within which to petition for a Writ of Certiorari. Accordingly, it would appear that the time within which Hoffman could properly petition for a Writ of Certiorari would be within 90 days following the aforesaid judgment of December 9, 1976, 28 U.S.C. §2101(c).

The time within which Hoffman could thus petition for a Writ of Certiorari would appear to have expired on March 11, 1977. However, Hoffman's instant petition was not docketed in this Court until April 9, 1977. We believe that petition to be untimely.

POINT II

The sole issue raised by the petition is a factual question of limited application.

It appears to be Hoffman's contention that under the factual circumstances of this case its employee Hogan had passed out of its control and thereby entitles Hoffman to avoid liability for its employees' negligence. That factual contention was decided adversely to Hoffman by both the District Court and the Court of Appeals. It is not believed that such a factual issue commends itself to a review by this Court.

POINT III

In affirming the judgment against Hoffman, the Court of Appeals adhered to the law set forth by this Court.

In rejecting Hoffman's argument that its crane operator Hogan had somehow passed out of its employment because he received signals from an ITO signalman, the Court of Appeals stated:

> "Hoffman argues that it is not liable because its crane operator, Hogan, was the borrowed servant of ITO. However, in a comparable factual setting, the Supreme Court has held that the mere reception of signals by a winchman from a stevedore's foreman did not operate to relieve the winchman's employer of liability for the negligence of its employee. *Standard Oil Co.* v. *Anderson,* 212 U.S. 215 (1909)."

The *Standard Oil* case involved a winchman hired and paid by the defendant, who alone had the right to discharge him (just as Hogan here was hired and paid by Hoffman, who alone had the right to discharge him). In

the *Standard Oil* case the winchman needed hoisting and lowering signals from employees of the stevedore (just as Hogan here needed such signals from an employee of ITO). In the *Standard Oil* case the winchman was negligent because he lowered a draft without receiving a signal to do so (just as Hogan in the instant case was negligent in topping the boom without a signal to do so). In the *Standard Oil* case the giving of signals by employees of the stevedore was urged by the employer of the negligent winchman as constituting a change in employer of the winchman (just as Hoffman is here contending that the signalling by ITO made its negligent crane operator, Hogan, the employee of ITO).

In rejecting such argument by the defendant in the *Standard Oil* case (the same argument here made by Hoffman) the Supreme Court stated:

> "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters."

In *Shenker* v. *Baltimore and Ohio Railroad Company*, 374 U.S. 1, 83 S. Ct. 1667 (1963) the Supreme Court again had occasion to consider the "borrowed servant" doctrine and reaffirmed what it had long before said in *Standard Oil Company* v. *Anderson, supra*, that the giving of signals or directions is only a "minimum cooperation necessary to

carry out a coordinated undertaking" and does not bring about a change in employer status.

Hoffman paid Hogan to operate its crane and it remained Hogan's employer and liable as such for his negligence, *Dornan* v. *U.S.*, 460 F. 2d 425 (1962).

In *Cijeck* v. *Crane Service Company,* 351 F. 2d 788 (1965) the Court considered the problem of *respondent superior* liability when dealing with leased cranes, and it made an interesting distinction. It stated that the crane operator's own general employer is the one liable for that operator's failure to operate with an appropriate degree of care and skill; but that the responsibility might be that of the lessee if the injury were caused not by any negligence of the crane operator in the operation of the crane but rather because of a foolhardy or careless utilization of the crane. In the instant case, we are dealing with a negligent act of the crane operator, Hogan, in topping the boom without having received any signal to do so, and knowing that such a maneuver would cause the draft to swing inshore. For that kind of negligent operation by Hogan, Hoffman is liable in accordance with law well established by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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